

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTONIO RODRIGUEZ,

Defendant.

8:01CR3123

MEMORANDUM AND ORDER

This matter is before the Court on the Defendant's Motion Requesting a Certificate of Appealability, also construed as a Notice of Appeal (Filing No. 276). The Defendant appeals from the Order (Filing No. 274) and Judgment (Filing No. 275) denying his Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("§ 2255 motion") and his request for a reduction in sentence under 18 U.S.C. § 3582(c)(2) and Amendment 750 to the sentencing guidelines.

I. Motion to Vacate, etc.

Before the Defendant may appeal the denial of his § 2255 motion, a "Certificate of Appealability" must issue. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), the right to appeal the denial of a § 2255 motion is governed by the certificate of appealability requirements of 28 U.S.C. § 2253(c). 28 U.S.C. § 2253(c)(2) provides that a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

....

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c).

A “substantial showing of the denial of a constitutional right” requires a demonstration “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were “adequate to deserve encouragement to proceed further.””⁴ *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)).

The issues raised in the § 2255 motion were carefully considered. For the reasons set forth in the Court’s previously issued Memorandum and Order (Filing No. 274) denying the Defendant’s § 2255 motion, the Court concludes that the Defendant has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c). Therefore, the Court also concludes that the Defendant may not proceed in forma pauperis on appeal.

II. 18 U.S.C. § 3582(c)(2) and Amendment 750

As the Court stated in its Memorandum and Order, the Defendant’s case did not involve crack cocaine, and therefore his request for a reduction in sentence was not considered further.

IT IS ORDERED:

1. The Motion Requesting a Certificate of Appealability (Filing No. 276) is denied;
2. The Defendant is not allowed to proceed in forma pauperis; and
3. The Clerk is directed to mail a copy of this Order to the Defendant at his last known address.

Dated this 7th day of November, 2012.

BY THE COURT:

s/Laurie Smith Camp
Chief United States District Judge